NO. 80-1840

Office-Supreme Court, U.S.
FILED
MAY 1 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

ALEXANDER SASSO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
UNITED STATES SUPREME COURT

ALEXANDER SASSO

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTION PRESENTED

1. Whether the Circuit Court's approval of the trial court's withdrawal of petitioner's factual defense from jury consideration, which defense was supported by the evidence, conflicted with early criminal cases in this Court, reduced the Government's burden of proof, denied petitioner the right to trial by jury, and raises for resolution what is the minimum threshold of evidence which will preclude a judge from withdrawing a factual defense from the jury?

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IN THE
UNITED STATES SUPREME COURT

ALEXANDER SASSO

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondents.

OPINION IN THE COURT BELOW

The order of the United States Court of Appeals for the Second Circuit, which gives the reasons for the affirmance of the judgment of conviction, is unreported, and is set forth in the appendix at page 1a.

GROUNDS FOR JURISDICTION OF THIS COURT

Judgment of conviction was entered in the United States District Court for the Southern District of New York on October 16, 1980, and the order of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction was entered on March 3, 1980. This Court has jurisdiction to review the judgment of the Circuit Court by Writ of Certiorari pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendments V and VI of the United States Constitution. These are set forth in the Appendix at pp. 6a-7a.

STATEMENT OF FACTS

The trial of the one-count indictment alleging a conspiracy to import cocaine into the United States presented two alternative theories for the jury's consideration.* The Government contended that petitioner Alex Sasso had recruited George Staples and Josephine Pizarro to travel to Peru, pick up cocaine, and return with it to the United States. The defense theory, for which there was evidence in the record, was that Staples and Pizarro in fact had been recruited by a man named Graham Benskin and that Staples and Pizarro were falsely implicating appellant in order to protect Benskin.

To establish its case the Government relied principally on the testimony of Staples and Pizarro. Both testified that in July 1979 a casual acquaintance known to them only as "Alex," offered $3,000 for them to travel to Peru to pick up cocaine; that petitioner was this person; that they negotiated the price up to $5,000; that Alex gave them instructions where to stay in Peru; that Alex supplied them with pouches and loose fitting clothing; that Alex drove them to the airport the day of their departure from New York and supplied them with $600 for expenses; that in Peru they met a man named Luca who gave them the cocaine; and, that upon their arrival in Miami a customs search disclosed the cocaine and they were arrested. Upon their arrest they agreed to cooperate with the Drug Enforcement Administration agents. They related the little they knew about Alex and then flew on to New York with

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* The United States District Court had jurisdiction to try the case because petitioner had been indicted for a federal crime. 21 U.S.C. §§846 and 963.

the agents. Alex, however, did not meet them at the airport. A few days later Alex did meet Staples at Staples' art gallery to inquire about the drugs. Both Staples and Pizarro were later indicted on federal charges in Florida and pleaded guilty and were sentenced. In exchange for their testimony the United States Attorney had agreed to send letters on their behalf to the parole authorities.

To support his theory of a frame designed to protect Graham Benskin, petitioner relied on the following evidence: documentary proof showed that two sets of airline tickets for the drug couriers' trip to Peru and back were purchased at a Bronx New York, travel agency. The first set bore the names of Bradford Hill and Pamela Parker as passengers; a Ditmars Boulevard address (where they lived together), and their phone number. These tickets were cancelled and replaced with tickets bearing Staples' and Pizarro's names and Graham Benskin's telephone number as the number to call in the event the airline had a change in flight plans. The testimony of Benskin, Hill, Parker and the travel agency personnel further showed that the description of the person who purchased both sets of tickets fit Benskin and not petitioner; that Benskin lived in the Bronx about six blocks from the travel agency; that Benskin and Hill were close friends; and that Hill and Parker did not have passports.*

From this evidence petitioner argued that Benskin had recruited Staples and Pizarro and they were implicating petitioner to protect Benskin. It was petitioner's theory that Benskin had originally purchased the tickets for his close friend Hill and Hill's girlfriend Parker; that Benskin had to cancel the first set of tickets because Hill

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* The trial court did not permit the jury to hear testimony of Benskin's own use of cocaine or of the large parties he gave at his house at which cocaine was used.

and Parker had no passports, and that he was then forced to recruit Pizarro and Staples and to purchase their plane tickets. Petitioner also relied on evidence showing that Staples and Pizarro knew very little about "Alex" and that the consideration given by the Government for their testimony gave them a motive to falsely implicate petitioner.

In summation the Government conceded petitioner "probably did not buy the tickets" (Tr. 448) but argued that the significant question was who had given the tickets to Staples and Pizarro. Defense counsel argued the defendant's theory of a frame without objection.

With the two theories thus before the jury, the trial court instructed them as follows:

> "An argument was made in the case which suggests that Mr. Benskin and perhaps others were engaged in criminal conduct and whether or not this is what the evidence shows is a matter upon which I have no opinion.
>
> "However, I caution you, as I mentioned at the time, that Mr. Benskin is not on trial before you. The government is attempting to prove in this case the guilt of Mr. Sasso of the crime charged beyond a reasonable doubt. If the Government succeeds in proving that, then Mr. Sasso must be found guilty. This is the question before you, and whether or not Mr. Benskin is guilty of some criminal activity has no bearing on the guilt or innocence of Mr. Sasso.
>
> "Guilt is personal and every person is responsible to society for his or her own actions and intentions and not for the actions and intentions of others. A defendant does not have to prove his innocence. Mr. Sasso is not required to prove that Mr. Benskin is guilty of some crime. You are to decide this case according to the proof or lack of proof of criminality on the part of the person who is on trial, Mr. Sasso. And whether or not Mr. Benskin committed some crime has no effect on that issue." (Tr. 541-542, 4a)

At the conclusion of the charge defense counsel took exception, stating, "I feel that the way in which your Honor presented the matter of Mr. Benskin really undercut my argument to the jury." (5a). The Court stated, "You can have an exception as to everything I said about Benskin . . . " (5a) and also indicated that it believed the defense was a "real red herring." (5a). Counsel pointed out that the charge had undermined the defense because it had been the defendant's position that Sasso was falsely implicated to protect Benskin (5a).

At sentencing, defense counsel urged a lenient sentence, pointing out that appellant was 40 years old, had no prior criminal record, was a family man with a six year old son, and was a fireman with 15 years of service in the New York City Fire Department. The Court, while accepting these facts, and concluding that appellant had not financed the unlawful activity of which he had been convicted, imposed a 12 year prison sentence.

In the United States Court of Appeals for the Second Circuit petitioner argued that the trial court's charge instructing the jury that Benskin's possible guilt had no bearing on petitioner's guilt or innocence was reversible error in light of the frame theory of the defense. Although the Government never argued that the evidence did not lend support to such a theory,* the Second Circuit ruled, "Because there was no evidence to prove Benskin's guilt of the crime with which appellant was charged, the court's instruction that 'whether or not Mr. Benskin is guilty of some criminal activity has no bearing on the guilt or innocence of Mr. Sasso,' was accurate" (2a-3a).

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* The Government did argue that the defense theory was a "red herring" or a smokescreen, but never contended there was *no evidence* to support it.

ARGUMENT

ALTHOUGH THERE IS NO RECENT AUTHORITY IN THIS COURT ON THE POINT, THE CIRCUIT COURT'S APPROVAL OF THE TRIAL COURT'S WITHDRAWAL OF PETITIONER'S FACTUAL DEFENSE FROM JURY CONSIDERATION, WHICH DEFENSE WAS SUPPORTED BY THE EVIDENCE, CONFLICTS WITH EARLY CRIMINAL CASES IN THIS COURT, REDUCES THE GOVERNMENT'S BURDEN OF PROOF, DENIES THE RIGHT TO TRIAL BY JURY, AND RAISES FOR RESOLUTION THE MINIMUM THRESHOLD OF EVIDENCE WHICH WILL PRECLUDE A JUDGE FROM WITHDRAWING A FACTUAL DEFENSE FROM THE JURY.

"We start with the proposition that the defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous." *U.S. v. Grimes,* 413 F.2d 1376, 1378 (7th Cir. 1969); *U.S. v. Alfonso-Perez,* 535 F.2d 1362, 1365 (2nd Cir. 1976); *Tatum v. United States,* 190 F.2d 612, 617 (D.C. Cir. 1951); *Strauss v. United States,* 376 F.2d 416, 419 (5th Cir. 1967). This rule is broad enough to encompass the theory that the prosecution's witnesses are lying, *U.S. v. Alfonso-Perez, supra* at 1356, or are framing the defendant. *U.S. v. Vole,* 435 F.2d 774 (7th Cir. 1970); *Smith v. United States,* 331 F.2d 784 (D.C. Cir. 1964) (en banc).

The few cases in this Court on the subject, while not expressed in terms of "the theory of the defense," lend support to the approach adopted by the Circuit Courts.

Thus, in *Smith v. United States,* 161 U.S. 85 (1896), the defendant claimed self-defense to a murder charge and established the deceased's reputation for being a quar-

relsome and dangerous person through a series of witnesses with somewhat unsavory backgrounds. The trial court charged the jury that evidence of character should "come from a pure source" and instructed the jury "to see to it that it is the reflection not by keepers of dives and gambling hells, and violators of law, and prison convicts," and if it comes from that source, to "cast it aside as so much worthless matter invoked wrongfully in cases of this character." 161 U.S. 89. This Court reversed:

> "This heaping up of injurious epithets upon the witnesses, coupled with the injunction (which could have no application to anything before the court except their testimony) to 'cast it aside as so much worthless matter invoked wrongfully,' could not have been understood by the jury otherwise than as a command to disregard all the testimony introduced in behalf of the defendant, bearing upon the character of the deceased as a quarrelsome and dangerous man . . . No doubt has been suggested as to the competency of any of the witnesses in question, and their credibility was a matter to be determined by the jury. The judge having, in effect, peremptorily withdrawn this matter from their consideration, the defendant is entitled to a new trial." 161 U.S. 89-90.

Again in *Bird v. United States,* 180 U.S. 356 (1901), the trial court's instruction failed to inform the jury that in evaluating the claim of self-defense they should consider that if the defendant reasonably believed he was acting to defend himself he was entitled to an acquittal. This was the pivotal issue in the case and this Court reversed:

> "The question involved in that instruction was a fundmental one in the case; indeed, it may be said that the defendant's sole defence rested upon it. The defendant, as shown in the bills of exceptions, had testified to his own belief that his life was in danger, and to the facts that led him so to believe; but by the instruction given the jury,

were left to pass upon the vital question without reference to the defendant's evidence." 180 U.S. 361-362.

Similarly, in *Allison v. United States,* 160 U.S. 203 (1895), the trial court instructed the jury that more was required to acquit than a defendant's own testimony asserting self-defense. This Court reversed:

"Defendant had testified to the facts upon which he based his belief that he was in peril, and it was for the jury to say from the evidence whether the facts as he stated them actually or apparently existed, and whether the homicide could, therefore, be excused either wholly or in part. And if the jury regarded the remarks of the court as applicable generally to defendant's testimony, then defendant was practically deprived of its benefit, and the statute enabling him to testify was rendered unavailing." 160 U.S. 209-210.

More recently, this Court criticized a Circuit Court reversal of a conviction as an improper interference with the jury's function because the reversal stemmed from the fact that the appeals court found the defense theory more credible than the prosecutor's. *U.S. v. Knight,* 336 U.S. 505, 508 (1949).

Similarly, in civil cases, this Court has criticized jury instructions the effect of which is "to withdraw from the consideration of the jury a very considerable amount of pertinent and important testimony for the defense," *Clement v. Parker,* 125 U.S. 309, 327 (1888); *Ranney v. Barlow,* 112 U.S. 207 (1884); *Vigel v. Naylor,* 65 U.S. 208, 211 (1865), and in recent criminal cases the Court's opinions have stressed that jury instructions should not create an "artificial barrier" to consideration of defense testimony, *Cool v. United States,* 409 U.S. 100, 104 (1972), or use devices which can "undermine the fact-finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable

doubt." *County Court of Ulster v. Allen,* 442 U.S. 140, 156 (1979).

Against this background the error in the courts below clearly emerges. At petitioner's trial there was one central issue: could the prosecution prove beyond a reasonable doubt that petitioner recruited the two drug couriers Staples and Pizarro? To raise a reasonable doubt, petitioner sought to lay before the jury his sole defense: Staples and Pizarro were framing him to protect a man named Graham Benskin. The defense was a two-pronged attack based on the evidence: first, a general attack on the credibility of Staples and Pizarro, two admitted drug couriers who were receiving favorable letters to the parole authorities in return for their testimony; and second, documentary proof, and the testimony of disinterested travel agency personnel, that Graham Benskin had purchased the couriers' airline tickets to Peru, one set for his close friend Bradford Hill and Hill's girlfriend Pamela Parker, and a second set for Staples and Pizarro after he learned (the defense argued) that Hill and Parker did not have passports. The defense then argued in summation, without objection, that the jury could infer from Benskin's purchase of the two sets of airline tickets and his close relationship to Hill that he was the actual recruiter, not the petitioner. The prosecution conceded under the weight of the testimony that petitioner did not purchase the tickets, but argued that the identity of the actual ticket purchaser was not relevant to petitioner's guilt or innocence as the recruiter.

With the evidence and case in this posture before the jury, the trial court then charged petitioner's theory of Benskin's culpability out of the case:

> "And whether or not Benskin is guilty of some criminal activity has no bearing on the guilt or innocence of Mr. Sasso." (Tr. 542)

> "You are to decide this case according to the proof of criminality on the part of the person who is on trial, Mr. Sasso. And whether or not Benskin committed some crime has no effect on that issue." (Tr. 542).

This was clear error to which defense counsel properly excepted. As in *Bird v. United States* the charge focused on petitioner's sole defense; it told the jury in effect to "cast it aside," *Smith v. United States, supra;* and as a practical matter the theory was "withdrawn from the consideration of the jury," *Clement v. Parker, supra,* and petitioner deprived of the benefit of all the evidence he had submitted. *Allison v. United States, supra.* That the trial judge did not think much of the defense theory is apparent from the record,* but, of course, a "judge's subjective personal views . . . have no place in his instruction to the jury . . . " *U.S. v. United States Gypsum Co.,* 438 U.S. 422, 460 (1978), and it was wholly improper to direct the jury not to draw certain inferences from the record, *U.S. v. DeLoach,* 504 F.2d 185, 190 (D.C. Cir. 1974), particularly after defense counsel had been permitted to argue the theory to the jury without objection. *U.S. v. United States Gypsum Co. supra* at 464; *U.S. v. Alfonso-Perez,* 535 F.2d 1362, 1365 (2nd Cir. 1976).

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* See, Tr. 138-140, 143, 421, 425. While making clear he thought the theory a "red herring" (Tr. 425), the trial court also made clear to defense counsel, "It is your duty to try this case under your theory," (Tr. 140), and "I'm not interfering with Mr. Cohen's [the defense counsel's] theory." (Tr. 143). The trial court never indicated it would in effect withdraw the theory from the jury's consideration.

The Circuit Court concluded, however, that, "Because there was *no evidence* to prove Benskin's guilt of the crime with which appellant was charged, the court's instruction that 'whether or not Mr. Benskin is guilty of some criminal activity has no bearing on the guilt or innocence of Mr. Sasso, was accurate." (2a-3a) (emphasis supplied). To support this conclusion, the court noted, "There was no evidence, however, that Benskin actually knew or recruited Staples and Pizarro. He denied knowing them, and both of them denied knowing him." (2a).

The Circuit Court's conclusion is extraordinary for several reasons. First, the Circuit Court says Benskin's bare denial refutes the clear import of the documentary evidence that he was involved in the scheme to import cocaine. Second, the Circuit Court clearly has usurped the jury function of evaluating the credibility of that denial in light of the documentary evidence. And lastly, to conclude there was "no evidence" in the record to support defendant's theory is contrary to the decisions of this Court and other Circuit Courts on how much evidence there must be to warrant jury consideration of a defendant's theory of the case. Indeed, at no point in the trial or in its brief before the Second Circuit did the Government contend there was "no evidence" to support petitioner's theory of the defense.

It is clear that a defendant does not have to raise an "open and shut defense" to have his theory considered by the jury, *U.S. v. Taglione,* 546 F.2d 187, 198 (5th Cir. 1977), and that in evaluating whether a defendant was entitled to jury consideration of his theory the evidence must be viewed in a light most favorable to the accused. *U.S. v. Lewis,* 592 F.2d 1282, 1286 (5th Cir. 1979); *see also, Ranney v. Barlow,* 112 U.S. 207, 214 (1884); *U.S. v. Bailey,* 444 U.S. 394 (1980). With this in mind, the Circuit Courts have said at times that a defendant is entitled to jury consideration of a defense theory for which there is "some

foundation" or "any foundation in the evidence"; *Tatum v. United States,* 190 F.2d 612 (D.C. Cir. 1951); *U.S. v. Parker,* 566 F.2d 1304, 1305 (5th Cir. 1978), *cert. denied* 435 U.S. 956 (1978); *U.S. v. Hagen,* 470 F.2d 110, 113 (10th Cir. 1972), *cert. denied* 412 U.S. 905 (1973); *U.S. v. Grimes,* 413 F.2d 1376, 1378 (7th Cir. 1969); *U.S. v. Blair,* 456 F.2d 514 (3rd Cir. 1972); *U.S. v. Alfonso-Perez,* 535 F.2d 1362, 1365 (2nd Cir. 1976); at other times they have spoken of "some basis in the evidence presented," *U.S. Bastone,* 526 F.2d 971, 987 (7th Cir. 1975) *cert. denied* 425 U.S. 973 (1976) or "evidentiary support for special facts sustaining a rational defensive theory." *Brooke v. United States,* 385 F.2d 279 (D.C. Cir. 1967). Whatever the formulation, it is clear that the "jury is not confined in its findings to matters that are directly set forth in testimony but may base an inference . . . on a 'reconstruction that is fairly inferable' from the evidence, gleaned perhaps by putting together some items from one witness, some from another, and some from the jury's own experience and sense of probabilities." *U.S. v. Huff,* 442 F.2d 885, 890 (D.C. Cir. 1971). It is also clear that the defense need not be "believable or sensible" in the eyes of the trial judge, *Strauss v. United States,* 376 F.2d 416, 419 (5th Cir. 1967), and jury consideration is warranted even though the evidence supporting the theory "be weak, insufficient, inconsistent, or of doubtful credibility." *Tatum v. United States,* 190 F.2d at 617. Accordingly, the Circuit Courts have upheld refusals to permit jury consideration of the defense theory in two types of cases: (1) where there was "not one scintilla of evidence" or "no testimony whatsoever" to support the defense theory, *U.S. v. Creamer,* 555 F.2d 612, 616 (7th Cir. 1977) *cert. denied* 434 U.S. 833 (1977); *U.S. v. Umans,* 368 F.2d 725, (2nd Cir. 1966) *cert. granted,* 386 U.S. 940, *dismissed* 389 U.S. 80, reh. denied 389 U.S. 1025 (1969); and (2) where the defense evidence even if accepted as true "does not support any acceptable

legal theory," *U.S. v. Cullen,* 454 F.2d 386, 390 (7th Cir. 1971) (per Stevens, J.), or does not establish the requisites of a legal defense such as duress, coercion, self-defense or insanity. *U.S. v. Bailey* 444 U.S. 394 (1980); *U.S. v. Agard,* 605 F.2d 665 (2nd Cir. 1979); *U.S. v Patrick,* 542 F.2d 381 (7th Cir. 1976) *cert. denied* 430 U.S. 931 (1977); *U.S. v. Linn,* 438 F.2d 456, 460 (10th Cir. 1971); *U.S. v. Winn,* 577 F.2d 86 (9th Cir. 1978).

This Court has rarely spoken to the question of when an issue should go to the jury and usually only in civil cases. In *St. Louis-San Francisco R. Co. v. Mills,* 271 U.S. 344, 348 (1926), it was stated that "the evidence must at least point to the essential fact which the jury is required to find." Foreswearing the use of terms such as "substantial evidence," "some evidence" or "any evidence," the Court observed in *Galloway v. United States,* 319 U.S. 372, 395 (1943):

> "The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *See also, Wilkerson v. McCarthy,* 336 U.S. 53, 57 (1949).

Some early cases in this Court suggest a similar approach in criminal cases. In *Sparf v. United States,* 156 U.S. 51 (1895) and *Andersen v. United States,* 170 U.S. 481 (1898), the Court addressed the question of whether the defendants accused of murder were entitled to instructions to the jury on the lesser offense of manslaughter. In both instances the Court ruled they were not, and the opinions speak of "an entire absence of evidence" to support a verdict on the lesser charge, 156 U.S. 99; or "the absence of all evidence tending to show that the defendants were

guilty of manslaughter," 156 U.S. 101; or "there being no evidence whatever" to support a manslaughter verdict, 156 U.S. 103; or "the evidence disclosed no ground whatever" upon which the jury could base a verdict for the lesser offense. 170 U.S. 510. Similarly, in *Battle v. United States,* 209 U.S. 36 (1908), there was "no evidence" to support a charge on justifiable or involuntary homicide because the defendant's own testimony asserted death was an accident and other testimony showed an intentional act. Significantly the Court noted that a sanity charge was properly given when there was "the merest shadow of evidence that the defendant was not of sound mind." 209 U.S. 38.

Otherwise, in criminal cases the Court has simply noted that the jury "alone is charged with the consideration and decision of the facts of a case," *Schaefer v. United States,* 251 U.S. 466, 476 (1928); *Hoke v. United States,* 227 U.S. 308, 324 (1913), and that "a judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood v. United States,* 330 U.S. 395, 408 (1947); *Sparf v. United States, supra* at 105. Recently, in *U.S. v. Bailey,* 444 U.S. 394 (1980) this Court concluded that to warrant submission of a duress defense to the jury in a prison escape case the evidence must "reach a minimum threshold such that if the jury believed it" all the elements of the defense would have been made out. 444 U.S. 412 n. 9.

The applicability of *Bailey* to other defenses in other types of cases remains to be seen. But assuming the *Bailey* formulation is similar to the "any foundation in the evidence" approach used by the Circuit Courts for defenses in general, it is clear that the Second Circuit was wrong in concluding there was "no evidence" to warrant jury consideration of petitioner's defense theory. Unlike

the defendants in *Bailey,* petitioner's theory was based on documentary proof, not "vague and self-serving statements" or "ambiguous conduct." 444 U.S. 415.* This was not a case in which there was absolutely no testimony nor a scintilla of evidence to support the defendant's theory. Making "due allowance for all reasonably possible inferences" favoring petitioner, it is clear that had the trial court not foreclosed the issue the jury could have concluded that the man who made the flight arrangements for the drug couriers—Graham Benskin—was the same man who had recruited them.

But even if a jury could not reach this conclusion with certainty, it must not be forgotten that petitioner was not obliged to so convince them. The Second Circuit appears to suggest that petitioner was obliged to prove his theory to the jury. But it was not necessary that petitioner convince the jury his theory was true, he only had to convince them that a reasonable doubt arose as to the facts necessary to a conviction. *Levine v. United States,* 261 F.2d 747, 748 n. 3 (D.C. Cir. 1958). Indeed, the Second Circuit's opinion amounts to the extraordinary finding that petitioner's theory could not as a matter of law create a reasonable doubt.

In this regard, *Cool v. United States,* 409 U.S. 100 (1972), held that a charge requiring the jury to consider defense testimony only if believed beyond a reasonable doubt effectively reduced the Government's burden of establishing guilt beyond a reasonable doubt. The result is the same here because it is conceivable that defendant's

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* Significantly, too, *Bailey* was a prison escape case and the policy considerations there which called for such a strict rule before a jury could consider a duress or necessity defense are not involved in either petitioner's or most other criminal cases. *See,* 444 U.S. 415 n. 11.

theory would have created a reasonable doubt in the minds of the jury, but that it was not considered because the charge instructed them that Benskin's involvement was not material. And as in *Cool,* the charge was particularly prejudicial because it was directed at petitioner's sole defense. *See also, U.S. v. Yates,* 553 F.2d 518, 520 (6th Cir. 1977).

There is one final consideration. A number of courts have observed that a charge such as the one here which forecloses a defense seriously implicates a defendant's right to trial by jury:

> "The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible." *Strauss v. United States,* 376 F.2d 416, 419 (5th Cir. 1967).

See also, Zemina v. Solem, 573 F.2d 1027 (8th Cir. 1978) affirming and adopting *Zemina v. Solem,* 438 F. Supp. 455 (S.D.S.D. 1977); *U.S. ex rel. Peery v. Sielaff,* 615 F.2d 402, 404 (6th Cir. 1980) *cert. denied* 446 U.S. 940 (1980).

A judge should be "cautious and unparsimonious in presenting to the jury all of the possible defenses which the jury may choose to believe." *Strauss v. United States, supra.* Neither the letter nor the spirit of this admonition was followed in petitioner's case.

In sum, this is a case in which, based on the evidence, the petitioner presented a rational theory of the defense to the jury. The charge to the jury nevertheless effectively withdrew the theory from the jury's consideration. The Circuit Court's ruling that the charge was correct because there was "no evidence" in the record to sustain the

defense theory is unsupportable, particularly when, as required, we view the evidence in a light most favorable to the defense theory. The Second Circuit's conclusion is certainly at odds with the other Circuit Courts which mandate submission to the jury of any reasonably inferable defense.

The ruling of the Second Circuit is also at odds with the only closely related cases in this Court, a series of early criminal law decisions requiring jury resolution of factual defenses. More recent cases such as *Cool v. United States,* 409 U.S. 100 (1972), and *Chambers v. Mississippi,* 410 U.S 284 (1973), which stress the importance of having the jury consider defense evidence, also suggest that the Second Circuit was wide of the mark.

The Second Circuit's ruling is also troubling because as a practical matter withdrawal of the defense theory from jury consideration reduced the Government's burden of proof as in *Cool v. United States, supra,* and deprived petitioner of trial by jury on the highly contested critical issue in the trial.

As a wealth of cases indicate, the Circuit Courts frequently confront the question of whether a defendant is entitled to have his theory of the defense considered by the jury. While this Court has given clear guidance when the defendant raises a legal defense such as entrapment or duress, i.e. *U.S. v. Bailey,* 444 U.S. 394 (1980), the guidelines are less clear when the defendant is seeking to raise a reasonable doubt through a factual defense. Because the Second Circuit ruled "no evidence" warranted jury consideration of petitioner's factual defense, this case squarely raises the important question of the minimum threshold of evidence which will preclude a trial court from withdrawing a factual defense from the jury's consideration. The writ of certiorari accordingly should be granted.

CONCLUSION

The Writ of Certiorari Should be Granted.

Respectfully submitted,

JEFFREY ULLMAN
NORMAN A. OLCH
STUART HOLTZMAN

ORDER OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse of the City of New York, on the 3rd day of March One Thousand Nine Hundred and Eighty-one.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge

HON. AMALYA L. KEARSE, Circuit Judge

HON. HENRY BRAMWELL, District Judge*

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or anyother court.

UNITED STATES OF AMERICA,

Appellee,

-v.-

ALEXANDER SASSO,

Defendant-Appellant.

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* For the Eastern District of New York, sitting by designation.

Appeal from a judgment of conviction entered by the United States District Court for the Southern District of New York on October 16, 1980.

Appellant was charged with conspiring to import, possess, and distribute cocaine in violation of 21 U.S.C. §§ 846 and 963. The prosecution presented evidence which showed that in July 1979, appellant recruited George Staples and Josephine Pizarro to fly to Peru and bring cocaine back to the United States. Appellant contended that he was being framed to protect one Graham Benskin. Benskin's connection to the case is that his telephone number appeared on the travel agency form in connection with the airline tickets used by Staples and Pizarro, that a person of his general description purchased those tickets, and that he was acquainted with two persons, other than Staples and Pizarro, for whom airline reservations to Peru had been made and canceled. There was no evidence, however, that Benskin actually knew or recruited Staples and Pizarro. He denied knowing them, and both of them denied knowing him.

Appellant's charge of error relates to the district court's instruction on the burden of proof. Because the defense had argued that Benskin may have been the person with whom Staples and Pizarro had dealt, the district court made clear to the jury that the defense was not required to prove Benskin's guilt in order for appellant to be found not guilty. The court instructed the jury that the Government was obligated to prove the appellant's guilt beyond a reasonable doubt. He said that Sasso was not required to prove his innocence, nor was he required to prove that Benskin was guilty of some crime. The issue for the jury was Sasso's guilt, not Benskin's. Because there was no evidence to prove Benskin's guilt of the crime with which appellant was charged, the court's instruction that "whether or not Mr. Benskin is guilty of some criminal ac-

tivity has no bearing on the guilt or innocence of Mr. Sasso," was accurate. The judgment is affirmed.

s/Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND

s/Amalya L. Kearse
HON. AMALYA L. KEARSE

s/Henry Bramwell
HON. HENRY BRAMWELL

CHARGE TO JURY

An argument was made in the case which suggests that Mr. Benskin and perhaps others were engaged in criminal conduct and whether or not this is what the evidence shows is a matter upon which I express no opinion.

However, I caution you, as I mentioned at the time, that Mr. Benskin is not on trial before you. The government is attempting to prove in this case the guilt of Mr. Sasso of the crime charged beyond a reasonable doubt. If the government succeeds in proving that, then Mr. Sasso should be convicted. If you decide the government failed in proving that, then Mr. Sasso must be found not guilty. This is the question before you. And whether or not Mr. Benskin is guilty of some criminal activity has no bearing on the guilt of innocence of Mr. Sasso.

Guilt is personal and every person is responsible to society for his or her own actions and intentions and not for the actions and intentions of others. A defendant does not have to prove his innocence. Mr. Sasso is not required to prove that Mr. Benskin is guilty of some crime. You are to decide this case according to the proof or lack of proof of criminality on the part of the person who is on trial, Mr. Sasso. And whether or not Benskin committed some crime has no effect on that issue.

EXCEPTIONS TO CHARGE

THE COURT: Do you have some exceptions?

MR. COHEN: Yes. I feel that the way in which your Honor presented the matter of Mr. Benskin really undercut my argument to the jury.

THE COURT: You can have an exception as to my discussion of the fact that Mr. Benskin was not on trial because he is not on trial.

MR. COHEN: Obviously that's a correct statement of the fact. That's not what I am discussing.

In discussing that particular fact—

THE COURT: You can have an exception as to everything I said about Benskin, how is that? Is that adequate for you?

MR. COHEN: Can I make a record so it is clear?

THE COURT: Isn't that enough of a record?

MR. COHEN: Sometimes when I get up to the Court of Appeals they say you never said it.

THE COURT: That was a real red herring.

MR. COHEN: Your Honor said it had no effect and my argument to the jury was if Benskin was involved, which we believe him to be involved, your Honor, then it would have an effect because the theory was that they were giving up Mr. Sasso because they had to protect Mr. Benskin.

THE COURT: That's only an argument about credibility. His testimony or his guilt has nothing to do with that.

CONSTITUTION OF UNITED STATES

AMENDMENT [IV]

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, an no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Proposal and Ratification

See note under Amendment [1].

AMENDMENT [V]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposal and Ratification

See note under Amendment [1].

AMENDMENT [VI]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Proposal and Ratification

See note under Amendment [1].

AMENDMENT [VII]

Civil trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Proposal and Ratification

See note under Amendment [1].

AMENDMENT [VIII]

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Proposal and Ratification

See note under Amendment [1].

AMENDMENT [IX]

Construction of Enumerated rights

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Proposal and Ratification

See note under Amendment [1].